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ARKANSAS BAR EXAMINATION
JULY, 2006

1 Page
EQUITY AND DOMESTIC RELATIONS

Jessica and Chris were divorced in 2000. They had two children together during the marriage. At the time of the divorce, Jessica was a struggling waitress by day and a law student at night. Chris was a struggling musician. Even though both parents loved their children dearly, the parties agreed in the divorce decree that Chris would have sole custody of their minor children, Jill, age 2, and Jack, age 4. They agreed to this even though Chris had an illicit affair with Jessica's best friend, Mary, during the marriage. This affair eventually led to the divorce and concluded on the day of the divorce. Neither party mentioned the affair as the cause of the divorce in the pleadings. or at the divorce hearing. They simply alleged "general indignities" had prevented them from continuing to live together as husband and wife.

Jessica was ordered to pay $100 per month in child support for both children, and does so sporadically.

Eventually, Jessica finished law school, passed the bar exam, and acquired the job of her dreams in Beverly Hills. Jessica was now being paid a hefty seven figure salary and living the good life. She even married a part-time movie star.

In the meantime, Chris gave up his dream of becoming a world-renowned musician, and was hired as a stocker at Wal-Mart. He has been so employed for the last three years. He and the children live in a modest two bedroom home in a quiet area of Little Rock.

Last year, Jessica realized that she sorely missed her children. She filed a motion seeking custody of her children.

BRIEFLY answer all questions:

1. You're the judge. Besides the best interests of the children, what standard(s) will you use in determining the custody issue?

2. **Based on the facts presented**, is it likely Jessica will be awarded custody? Why or why not?

3. Does the fact that Chris had an affair with Mary bear on the change of custody issue?

4. May Jessica bring her custody suit in California? Why or why not?

ARKANSAS ESSAY

Equity and Domestic Relations

1. Besides the best interests of the children, which is always a predominate factor in child custody decisions, I will use the "material change in circumstances" standard. To warrant a change in custody, there must be a material change in circumstances as to one or both parents. Because Chris has already been determined to be a fit parent and awarded sole custody of his two children, Jessica would have to show a material change in circumstances that renders Chris's continuing custody not in the best interests of the children. Examples of such material changes would be if the custodial parent were participating in illegal or immoral activity, arrested or imprisoned or was unable to care for the children financially. The improved circumstances of the noncustodial will not, in most cases, be considered a material change warranting a change of custody.

2. Jessica is unlikely to be awarded custody based on the facts presented. As stated before, her improved circumstances, while significant, does not in itself warrant a change of custody. Based on the facts, Chris provides a decent home for himself and the two children, he is steadily employed, and there is no evidence of any illegal or immoral activity on his part. The fact that he gave up the life of a musician and obtained steady employment shows his commitment to the children's stability and well-being. Overall, Jessica will be unable to show a material change in circumstances, nor will she be able to show that a change of custody would be in the best interests of the children. The children's whole life is in Arkansas: Friends, school, home and then primary caregiver for the past six years. Only a material change of circumstances would warrant disrupting their lives by a change of custody.

3. The fact that Chris had an affair with Mary will not have any bearing on the change of custody issue. While it is true that a parent's moral fitness, including participating in "immoral" activities, such as an affair, are always a relevant factor, the affair with Mary could only have been a factor in the original child custody determination. Jessica had the option of raising the issue at that time but chose not to do so. To obtain a change of custody now, Jessica must show a material change of circumstances since the original order was entered. Based on the facts, there is no occasion that Chris has been involved in any questionable, immoral, or illegal activity since the original order was issued. In fact, he seems to have settled down by giving up the musician lifestyle and getting a steady job. His affair with Mary ended years ago at the time of the divorce, and because there is no indication of any impropriety since then, the affair will not be an issue.

4. Jessica may not bring her custody suit in California. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which Arkansas has adopted, child custody can only be decided in a child's home state, defined as the place the child has lived for at least six months prior to the determination. Here it appears that the children have lived in Arkansas all their lives, so Arkansas is, without question, the home state for purposes of child custody issues. The purpose behind the UCCJEA is to simplify custody and jurisdiction issues by declaring that one state, the home state, will have jurisdiction, and the other 49 states will decline jurisdiction. So in this situation, Arkansas is the home state that initially decided the child custody arrangement, and

Arkansas continues to have exclusive jurisdiction over the child custody determination regarding Jill and Jack. Therefore, Jessica will have to bring suit in Arkansas if she wishes to change the current child custody arrangement.

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ARKANSAS BAR EXAMINATION
JULY, 2006

2 Pages
CRIMINAL LAW AND PROCEDURE

In a bold heist, Donald Trump's brand new midnight blue Corvette was stolen curbside of his girlfriend's apartment building about 10 p.m. on a Saturday night. The car was loaded with the most expensive and gaudiest of every conceivable gadget and trim, from Sirius radio to chrome spinners. It cost a fortune, of course.

The doorman said he had seen nothing. He had turned his back to speak to a tenant, and when he looked back to the street, the car was gone.

The Donald was HOT! The NYPD had to produce results on this one, and fast.
Officer Looney was willing to swear to the Judge that *he* thought there was reason to believe the car had been stolen by or on behalf of Johnny Lee "Hack" Hackett, who (he had it on good authority) operated a chop shop over in Queens, and who - not just coincidentally - was the doorman's brother. A car like that, it'd be worth a fortune chopped up. They oughta look in Hack's garage, but they'd better do it fast, or that car would be chopped up and sold off by morning. No, he didn't have any *hard* evidence, no one had seen anything, but word on the street was that Hack had chopped some pretty fine cars lately, and The Donald's new Corvette would sure be a prize.

The search warrant was promptly signed, authorizing a search of the garage premises at 2237 Pecknell Street in Queens, to search for a 2006 midnight blue Corvette, VIN WX48592Hg398733. Looney and his men were there before midnight. They didn't bother to knock. The door was flimsy, and gave open at the first twist of the knob, but there was nothing much inside except a couple of dirty old men in undershirts smoking cigarettes and drinking beer, some mechanics' tools, and various car parts - none of them midnight blue.

"That car's here somewhere, or there's evidence that'll show us where it went, I just know it," announced Looney, starting up a staircase at the back of the garage.

"That ain't part of the garage," one of the old men drinking beer said. "That's Hack's apartment. I wouldn't go up there if! was you."

Looney was already up there, pounding on the door, shouting - "Police Officers.
We got a warrant. Open up or we'll break down this door."

The door opened as far as the chain latch would allow, and a woman's face appeared. "Hack's n-n-not here," she said.

"Don't matter. Open this door. We got a warrant."

The door closed, the chain latch came off, and the door opened again. "I g-g-g¬guess you c-c-c-can come in. I d-d-d-don't know. I j-j-j-j-j-just w-w-work here."

Looney and his men were already in by then, pulling open closets, lifting up rugs, emptying drawers, rummaging through every nook and cranny of the apartment. When the search ended, they had two dozen baggies, each containing a suspicious white powder - found in a drawer by the bed - as well as $235,000 in cash - found in the freezer - but nothing to connect Hack to the theft of the blue Corvette.

When the chemical analysis of the white powder came back, Hack was arrested at a local bar, and charged with possession of cocaine with intent to deliver. He was out of control in the police cruiser on the way to the station, shouting at the arresting officer, demanding to see a lawyer, banging on the window, and making strange gagging sounds. The police put him in the drunk tank to sober up before talking to him.

In the drunk tank, Hack babbled away to anyone who would listen. He was obviously out of his head on something. By the time he was taken into an interrogation room the following morning, however, he was sober. He told the interrogating officer his name, address, and occupation, but then clammed up and again demanded a lawyer before he would talk any more.

You are called to the jail to represent Hack, and you counsel him against talking to the police about anything. He listens to you, and tells the police nothing, but later tells you that he spent the night in the drunk tank and thinks he may have said things he now regrets. Being a seasoned criminal defense attorney, you are aware that the police in your town frequently rely on several local drunks as jailhouse snitches to help them "gather information. "

What pre-trial motion(s) will you make on Hack's behalf? What arguments will the prosecutor use to counter your motion(s)? What ruling(s) do you anticipate?

ARKANSAS ESSAY

Criminal Law and Procedure

As Hack's attorney, I have a number of motions to make, although the final result depends upon the rulings of the court as to each motion. The following motions are made in order of the fact pattern and not on the strength/weaknesses of each issue:

I. My first motion would be to exclude any evidence obtained during the search because the police did not have probable cause sufficient to search the garage. While generally the police are allowed to rely upon a warrant issued by an impartial magistrate, this applies only to officers not involved in the issuance of the warrant. In this case Officer Looney both sought and executed the warrant. Looney sought the warrant based on the facts that Hack is known to run a

chop shop and that he is the brother of the doorman. This information standing alone raises doubt as to the validity of the information. Probable cause sufficient for a warrant is simply a showing that a crime or evidence of crime is more likely than not to be present. As stated, Looney had no hard evidence but merely speculation that the car would be there. The facts do not state the "good authority" relied upon; but regardless, the information would have to come from a person with firsthand knowledge or a trustworthy source. Although such information does not have to be listed in the warrant, the application filled out by the officer would have to make a good faith showing of either of these requirements. The officer's word alone is not sufficient.

The prosecutor will contend that the information is sufficient. The concurrence of the facts that the doorman's brother runs a chop shop, along with the fact that the doorman did not see the theft, could reasonably lead a magistrate to conclude that instruments of crime could be found. The information that a chop shop exists comes from "good authority." The prosecution will argue that the fact a judge issued the warrant leads to a presumption that the source either had firsthand knowledge or was a trustworthy source.

Although the facts appear thin to issue a search warrant based on probable cause, a judge would likely uphold the warrant. The burden of probable cause is extremely low and historically such warrants are not found invalid upon challenge.

II. My second motion would be to exclude evidence obtained due to the improper execution of the warrant. While the warrant appears valid on its face, the officer's execution was substandard. Warrants are to be executed in the daytime and with a knock and announcement by the police as to their presence and authority to enter (i.e., "we have a warrant"). Only under exceptional circumstances, such as for the protection of the officers (based on specific facts) or the destruction of evidence, can the knock and announce rule be circumvented. Any warrant executed at night must be approved by the judge or magistrate; therefore, the cops's nighttime search was improper, as no showing was made as to why a nighttime warrant execution was proper. Furthermore, the facts fail to show a danger to the police existing when the warrant was sought, nor do the facts demonstrate the police reasonably formed such beliefs upon approaching the garage. Additionally, there has been no showing of the possibility of destruction of evidence, which would be difficult considering the evidence being sought (i.e., vehicles are not readily disposable on a moment's notice).

The prosecution will argue that the inherent nature of car theft and the type of people involved in such crimes gives the police a good faith belief that a danger exists. Likewise, prosecution will argue that time was essential as the chop shop business quickly dismembers vehicles for sale. Thus, any other time (such as waiting until the morning) would have frustrated the search.

A judge will likely rule that the search was improper due to the fact it was conducted at night and the officers did not knock and announce their presence.

III. I would also make a motion that the police exceeded their scope of the search by entering the apartment. The warrant specifically stated the police were searching for parts of a midnight blue car and its accessories. While conducting their search of the garage, they found no such items, and upon

approaching the apartment, they were notified what the room was. Additionally, the apartment was upstairs, which should have notified the police that no car would be up there.

The prosecution will contend that the warrant allowed the search of the entire garage, that the police are not required to rely on the word of bums in determining what is or is not part of the garage and that if, as contended, a car is chopped up in such a short time, they had a good faith belief that evidence of the crime would be up there (such as the chrome spinners or radio). While police may not look in a container that obviously could not contain the sought-after item (such as looking in a jewelry box for the rims of the car), they had a reasonable belief that a locked room could hold parts of the missing car.

A judge will likely rule the police did not exceed the scope of the warrant since police are allowed to look anywhere that evidence could be located.

IV. I would also make a motion that because the room was an apartment in which Hack lived, he had a reasonable expectation of privacy in the room. As such, the woman did not have the authority to consent to a search of the room. Upon opening the door, the lady stated she only worked there; and, therefore, the police were on notice that she did not have actual authority to consent.

The prosecution will argue that the nature of the locked room was not evident from the outside (since it was an apartment located in a garage); and, thus, they had good faith to believe it was part of the garage. Likewise, the police believed the woman had apparent authority to grant consent. Not only was she located within the room, but she had the door locked. She also stated that she worked there and, thus, had the authority to enter for her "job." Furthermore, upon execution of search warrant, the police have the ability to detain any persons found within the residence or building in order to ascertain their involvement. Thus, when she answered the door, the police were allowed to remove her. Additionally, the police were allowed to do a protective sweep of the room to ensure no other people or dangers were in there.

A judge will likely rule the police were correct to assume the woman had the apparent authority. Likewise, the judge will likely find the police were proper in entering the room to remove the lady and to conduct a protective sweep.

V. My next motion would be that the police exceeded the scope of the search by looking in "every nook and cranny" of the apartment. As stated above, the police are limited to searching areas in which evidence of the crime could be reasonably found. The evidence found (cocaine) was found inside a dresser draw near a bed and money in the fridge. Thus, the police were not reasonable to believe that evidence of the car theft was located in such a small area.

Of course, as stated above, the police may search any container which could reasonably contain such evidence. Since the car could have already been dismantled, it was reasonable for the police to search in the drawers and freezer for such items (like the radio and spinners).

As stated in Section III, a judge will likely rule the police did not exceed the scope of the warrant since it was reasonable that evidence would be found in the drawer.

VI. My next motion would be for the police to disclose all evidence against Hack, including any inculpatory and exculpatory statements made by Hack. Because Hack may have made incriminating statements either on the ride to the station or in the drunk tank, it would be pertinent to know the nature of the statements.

The prosecution does not have any argument against this request.

A judge would rule that such information must be disclosed. Failure to do so could result in its inadmissibility at trial.

VII. If any statements made to the officers or snitches are adverse to Hack, I would make a motion that Hack's Miranda rights were violated in two ways - right to remain silent and right to counsel. The facts do not state if the Miranda warnings were read to Hack upon his arrest. Although Miranda only applies when a defendant is in custody and subject to interrogation, the facts do not make if this was the case. Of course, Hack was in custody - he was arrested in the back of a police car. But as to the interrogation, it would be necessary to know if the police said or did anything reasonably calculated to entice a response or statement by Hack. Furthermore, Hack requested a lawyer while in the police car; and, thus, any form of interrogation (or actions likely to entice a response) must be examined in this context.

The prosecution will argue that no interrogation occurred; and, thus, any spontaneous statements made by Hack do not constitute a violation of his Miranda rights since they were not made in response to questioning by the police. Likewise, the State will argue that the right to counsel was not violated since Hack was not refused counsel at any point, since counsel was provided (although the next day after Hack sobered up). Additionally, the prosecution will argue that even if Hack requested a lawyer, the circumstances surrounding the request (back of the car, drunk, screaming, talking gibberish) was not an absolute invocation of his right to counsel. Additionally, upon being interrogated the next morning (while sober) he demanded a lawyer, thus, properly invoking his Miranda right to counsel. Finally the use of jailhouse snitches is constitutional when the defendant has not been charged or when his statements are made voluntarily to the snitch. Before he is charged (and after invocation of right to silence or lawyer), his statements may be used against him if made voluntarily. They may also be used if elicited by the snitch (as the right to silence only applies when there is police interrogation). After the defendant is charged, such statements made to snitches may be used against him if they are made voluntarily. (Use of snitches to elicit statements after being formally charged violates the Defendant's Sixth Amendment right to counsel since the eliciting snitch is seen as an agent of the State; nevertheless, voluntary statements made post-indictment may be permissible used).

A judge would need more facts before making a determination as to this motion. Such motions are factually dependent; and, thus, a hearing would likely be required.

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ARKANSAS BAR EXAMINATION
JULY, 2006

1 Page
WILLS, ESTATES, & TRUSTS

Dot was born in 1950 in Dallas County, Arkansas. In 1980 she executed a Last Will and Testament that was valid in all respects. It provided that after her death all of her estate would be inherited by the Local Arts Council, Inc., a non-profit 501(c)(3) corporation. In 1990 Dot tore up the 1980 will and informed her attorney that she had destroyed the will. Dot was the last of her line and no heirs existed after her death.

In 2000 Dot executed a will and provided in the residuary clause that her estate would be distributed to the Local Arts Council, Inc., to Bo, and to Cat equally, share and share alike. The will was prepared by Dot's attorney and Dot's signature on the will was witnessed by the attorney's office assistant, and by Cat. Bo and Cat were life-long friends of Dot, and both survived Dot.

Dot was a resident of Dallas County her entire life, but died of a sudden illness while hospitalized in Pulaski County, Arkansas in June, 2006. Dot owned land in both Dallas and Pulaski counties. While in the hospital Dot made the comment: "Oh, I wish I had not signed that will I made in 2000!"

1) What are the requirements for a person to execute a will?
2) Was Dot's 1980 will properly revoked? What are the requirements for a person to revoke a will?
3) What are the requirements for a person to witness a will?
4) What effect, if any, did Cat's witnessing the will have on the validity of the will itself? Please explain.
5) What is the proper venue for the probate of Dot's estate.
6) Did Dot's comment that she wished she had not signed the 2000 will have any legal effect on the validity of her 2000 will? Please explain.
7) Under these facts, please describe how Dot's estate will be distributed.

ARKANSAS ESSAY

Wills, Estates, Trusts

1. What are the requirements for a person to execute a will?

The requirements for a person to execute a valid attested will are: 1, the testator has the intent to make a will, that is the intent cannot be equivocal or be a fraudulent intent, et cetera; 2, the testator has the capacity to make a will, that is she must be at least 18 years old and be of sound mind; 3, the testator must sign the will at the end in the presence of two witnesses; 4, the two witnesses must

sign the will in the presence and at the direction of the testator; and, 5, the testator must publish the will to the persons witnessing it, such as by stating, "This is my Last Will and Testament."

Arkansas also recognizes holographic wills, which do not require as many formalities as attested wills. For a holographic will, a testator must have, 1, the intent; 2, the capacity to make a will; and, 3, the will must be completely in the testator's own handwriting and, 4, the testator must sign the will.

2. Was Dot's 1980 will properly revoked?

There are three ways to revoke a will in Arkansas.

First is the revocation of a will by the execution of a new will that purports to revoke all previous wills. Second is by operation of law, which generally applies in cases in which a husband and a wife divorce and the devises in the husband's will to his wife are revoked by the law because the law presumes that he would no longer intend to devise the property to his wife. Third, a will can be revoked by a physical act done with the intent to revoke the will. A physical act can consist of: Burning, tearing, destroying, obliterating or cancelling the will. Again, if a will is mistakenly destroyed, then the interested parties under the will might be able to have the destroyed will probated anyway.

Here it seems that Dot properly revoked her 1980 will. Dot revoked her will by physical act by tearing up the 1980 will. Additionally, the fact that she reported to her lawyer that she had torn up the will and the fact that she later executed a new will indicates that she had the intent to revoke the will.

3. What are the requirements to witness a will?

In order to witness a will, a witness must be at least 18 years of age. Because the purpose of a witness is to witness the signature of the testator, the witness must be able to observe the testator signing the will or at least in some cases it is acceptable if the witness is aware of the presence of the testator who is signing the will and aware that he is signing the will. Also the witness may be required later, if there is a will challenge, to recall and testify to her memory of the execution of the will.

4. What effect did Cat's witnessing the will have on the will?

The will is still valid even though Cat was a witness to the will, but Cat will not be able to take her share under the will.

Generally, in Arkansas the two witnesses to an attested will must be disinterested witnesses, that is they are not beneficiaries under the will. However, if one of the witnesses is interested, the law will require that that witness not be allowed to take under the will. There are two circumstances, however, when the law will allow an interested witness to take under the will. The first is if there

was a supernumerary witness at the execution of the will who was disinterested then the interested witness will be allowed to take under the will (that is there should be three instead of just two witnesses). The other option is that an interested witness who would otherwise take from the decedent's estate as an intestate heir (for example, one of the decedent's grandchildren) then that interested witness is entitled to take the lesser of her intestate share or her bequest under the will.

Here neither of the exceptions to the rule have been met. The facts indicate that the will was executed by Dot in the presence of Cat and the lawyer's assistant (the lawyer does not count as a witness), and the facts do not indicate that there was an other, supernumerary, witness. Additionally, as a friend of Dot, Cat would not take as an intestate heir under Dot's estate, so that exception does not apply. Therefore, Cat will not be allowed to take under the will, and her share will pass to the other residuary beneficiaries.

The fact that Cat was a witness to the will does not raise an immediate presumption that there was undue influence that resulted in the will, but one of the interested persons under Dot's estate might be able to use undue influence for grounds for challenging the will if he were able to show an undue influence that was exerted by Cat, which overcame Dot's free will and which resulted in a will that would not have otherwise existed but for Cat's influence. However, this is probably unlikely to be proven since Dot was leaving her estate to her two lifelong friends and did not seem to have any heirs existing at her death and her 2000 will was also in somewhat in accordance with her 1980 will and leaving part of her property to Local Arts Council.

5. What is the proper venue to probate Dot's estate?

The proper venue to probate Dot's estate is Dallas County. Generally an estate is probated in the venue that is the decedent's domicile, that is the place where the testator was permanently residing at the time of her death. Here while Dot was physically in Pulaski County when she died, she still seems to have been domiciled in Dallas County because the facts indicate that she had lived therefor her entire life.

The fact that some of Dot's real property is in Dallas County and some is in Pulaski County should not have an effect on the venue that the estate is probated in. All of the real property within one state should be validly disposed of by probate proceedings by a court validly have jurisdiction of the estate within the state. If some of the property had been in another state, then this might have required that that particular property be probated in the other state because a state generally has the exclusive jurisdiction over the property that is within that state.

6. Did Dot's comment about the 2000 will have any legal effect on the will?

Dot's comment about the 2000 will probably does not have any legal effect on that will.

As discussed above, for a will to be properly revoked, it must be revoked by either physical act, by operation of law or by the execution of another will. Here none of these have occurred and the mere

words of regret that Dot expressed would probably not be sufficient to have the effect of revoking the will.

Also, the doctrine of dependent relative revocation does not apply here because that doctrine only applies to revive a will that the testator would not have revoked but for a mistake of law or fact (that is the testator had a first will and revoked it and then had a second will and revoked the second will thinking that this mere act alone would be sufficient to revive the old will). Here Dot has a valid second will, and the facts do not indicate that she attempted to revoke it with any intent to revive her 1980 will.

7. How will Dot's estate be distributed?

Dot's estate will be distributed to the Local Arts Council and to Bo in equal parts (ignoring any other devises that might not have been mentioned in the facts). As stated above, Cat will not be able to take under the will because she was an interested witness to the 2000 will, and none of the exceptions to that rule have been satisfied. When a residuary beneficiary either predeceases to the testator and the anti-lapse statute does not apply, or as in this case, the beneficiary is eliminated from taking under the will by another means, then the remaining residuary beneficiaries will take the eliminated beneficiary's share under the will in equal parts, unless the will provides for the effect that the elimination of that beneficiary will have on her devise (for example, will it pass to another beneficiary that is indicated in the will). Here because Cat cannot take under the will and because Local Arts Council and Bo are the remaining residuary beneficiaries, they will take the residue and will take Cat's share in equal parts.

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ARKANSAS BAR EXAMINATION
JULY, 2006

2 Pages
PROPERTY

Jane Doe and John Smith, each residents of Arkansas, met while attending an Ivy League law school. Jane's family owned and operated a large construction company and specialized in developing residential and commercial properties. John's parents owned an investment company that purchased and sold undeveloped real estate. John and Jane each worked in their respective parents' businesses while growing up. Drawn to each other because of their Arkansas heritage and their parents' similar careers, Jane and John became fast friends.

Following graduation and their return to Arkansas it seemed natural that Jane and John should go into business together since neither wanted to practice law. So they did. Their search for the land for their first business project began in earnest. They decided to develop a luxury home subdivision in Northwest Arkansas, one of the fastest growing regions of the United States. Jane spent her time developing the concept, financing and plans for the project. John hiked the hills and mountains of the region in search for the magical property.

Success came quickly for John. He found a 1300-acre tract, which combined mountain vistas, rolling hills and meadows through which a small stream meandered year round. Jane too had completed as much of her part of the project as possible until the land was under their ownership.

Like so many others, they abandoned much they had learned in law school. They decided to acquire the land personally ... not through an appropriate business entity ... and gave their experienced Arkansas real estate attorney specific instructions on the preparation and language of the deed used to convey the property to the two, ignoring their lawyer's advice in the process. The granting language in the deed concluded with the words " ... Jane Doe and John Smith, jointly and severally, and unto their heirs, assigns and successors forever."

Jane set to work to complete the final design phase of the project and John hiked the property with prospective purchasers. Tragically, while on one such hike John fell from an outcropping of rock and died. The project idled following John's death. Months later, John's parents met with Jane to discuss the future of the development. His Mom and Dad were quickly informed that in spite of their expectation of involvement, Jane claimed sole ownership of the property and that they had nothing ... no interest in the land or the planned development. Surely, they urged, Jane recognized they now owned John's one¬half interest in the project and the land! Jane's lawyer assured them Jane was the surviving tenant of a joint tenancy with right of survivorship, owned the 1300 acres and the project exclusively and that they ... John's grieving parents ... owned nothing. John's parents filed a lawsuit.

The positions of the parties were simple. Jane pointed to the language of the deed clearly reflecting, she said, that a joint tenancy with right of survivorship was created by the deed. John's parents were equally confident that the deed in fact had created a tenancy in common with Jane and John each owning an one-half interest in the land.

1. Briefly describe the fundamental differences in owning land as a "joint tenant with right of survivorship" and as "a tenant in common." Assume in answering this and all other questions that follow that John had no children, no wife and no will.

2. The Court must now determine who owns the land and the precise interest of the owner(s).

a) Did the deed used by Jane and John create ownership as tenants In common or as joint tenants with right of survivorship?
b) Describe the rationale for your conclusion.
c) Who now owns John's interest in the land? Describe the precise interest held by the owner(s).

ARKANSAS ESSAY

Property

1. Two of the most common forms of co-ownership or joint ownership of land are tenancies in common and joint tenancies with right of survivorship. There are fundamental differences in the two types of ownership.

Joint tenants with right of survivorship co-own land with equal ownership. One of the most important components of this ownership type is the right of survivorship. The right of survivorship means that upon the death of one joint tenant, the other tenant, the survivor, is entitled to full ownership rights in the property in fee simple. Upon the survivor's death, the land passes to survivors, heirs or devises.

If the joint tenancy with right of survivorship is severed, then the form of co-ownership becomes a tenancy in common.

A joint tenancy with right of survivorship usually requires four unities upon creation. The four unities are time, title, interest and possession. To successfully create a joint tenancy with right of survivorship, these unities must be present. However, it is important to note that Arkansas looks to the party's intent to determine what type of interest was intended to be created.

Further, in Arkansas when one wishes to create a joint tenancy with right of survivorship from property a person currently owns, a "straw man" conveyance is not required in order to comply with the four unities.

Language in creation of the joint tenancy can be a good indicator of intent. The key to the language is usually the use of the "right of survivorship" language in the creation of this type of estate. Such language would suffice as words of creation.

Tenancy in common: A tenancy in common is another common form of co-ownership of land. A tenancy in common does not require the four unities or intent to create. In fact, it is typically the default form of property co-ownership. Tenants in common are entitled to use of the full land. Tenants in common can seek to partition the land - in kind or by sale.

Most significantly, tenants in common do not have a right of survivorship in the property. Thus, upon the death of one tenant in common, that tenant's interest passes intestate or by devise. It does not pass to the surviving tenant(s) automatically. Although, a tenant in common is free to devise his or her interest to another tenant in common.

2.

(a). John and Jane likely created a tenancy in common in the deed they used.

(b). The classification is a close call, but in the end John and Jane likely created a tenancy in common.

Deed language: John and Jane insisted on the deed language used. It is a bit ambiguous.

First, it uses the phrase "jointly and severally," which could be construed to imply joint tenancy with right of survivorship because of the use of the word "jointly." Jointly and severally implies that they intended to confer rights that come along with a joint tenancy with right of survivorship.

However, the rest of the deed language, "and unto their heirs, assigns and successors forever" seems to indicate that Janet and John did not contemplate a right of survivorship, the hallmark of a joint tenancy with right of survivorship. This language indicates a desire for the rights of Jane and John to pass to their individual heirs/assigns - to the survivor of the two of them.

Because the deed language is ambiguous, it does not express a preference for a joint tenancy with a right of survivorship. The interest created will likely be a tenancy in common.

Intent: Additionally, we don't have any indication of the parties's intent to provide us with a presumption that they intended to create the joint tenancy with right of survivorship. Arkansas considers intent.

Four unities: Though the unities required for the creation of a joint tenancy with right of survivorship are present, this does not mean that the parties intended to create or did create a joint tenancy with right of survivorship.

(c) Because the property will be considered a tenancy in common, John's parents own John's interest in the land. Thus, Jane still owns a half interest as a tenant in common in the land, and John's parents each own a fourth interest as a tenant in common in the land.

APPLICANT NO. _____

ARKANSAS BAR EXAMINATION
JULY, 2006

2 Pages
TORTS

Jimmy Seward and Harvey Hare are both 19 years of age. About midnight, not too long ago, they dropped into the Rabbit Hole Tavern (an establishment duly licensed by the Arkansas Alcoholic Beverage Control Board to dispense alcoholic beverages) in Waterdown, Arkansas, hoping to whet their whistles.

The tavern's bartender served Jimmy five double-scotches and Harvey five "Rabbit¬Punches" (a potent rum concoction). The two boys stumbled out of the Rabbit Hole at 2:00 a.m. obviously drunk.

Jimmy got behind the wheel of his car, and Harvey rode shotgun. They gained access onto the cross-town freeway up the exit ramp and started down the divided highway in the wrong direction.

Vance Armstrong has been training for the Tour de Lower Arkansas bicycle race during early morning hours and was coming down the exit ramp on his bicycle as Jimmy was going up. Vance was smushed like a bug; his back broken; his limbs paralyzed; his career ended. While at the hospital, Vance was also diagnosed with end-stage testicular cancer which no one knew he had.

Hitch-hikers, pedestrians, and bicyclists were prohibited by federal, state, and local law from use of the freeway or its ramp.

Jimmy and Harvey were unscathed. There was a slight smudge on Jimmy's rubber bumper which wiped off easily.

ESSAY QUESTIONS

1. **Fifty Percent of Your Grade.** Describe and discuss any causes of action which Vance may have against any persons or entities. In your discussion, specify the essential elements of any claims, identify the elements and nature of damages which might be recoverable, and discuss what defenses might reasonably be asserted responsive to any claim as a bar to or in diminution of any claimed damages.

2. **Twenty-five Percent of Your Grade**. Change the facts somewhat. Assume Jimmy and Harvey got drunk at a dinner party hosted by Bubba Batalia, a friend. Describe how this change in the facts affects Vance's claims.

3. **Twenty-five Percent of Your Grade**. Change the facts again. No drinking involved. No expressway. Vance was riding in a dedicated bike lane. The steering in Jimmy's new car (built and sold by Vroom Motors) malfunctioned due to a break in a steering cable (caused by a weak spot in the steel strands), causing Jimmy's car to veer out of its lane and crush Vance. Vance was perfectly healthy prior to the collision.

ARKANSAS ESSAY

Torts

I. Causes of action which Vance may have against persons or entities:

A. Potential liability of Jimmy Seward:

Vance will most likely have a valid cause of action against Jimmy Seward for negligence. The elements of negligence are as follows: A duty to act, an applicable standard of care, breach of that standard of care, causation (both actual, but/for causation and proximate (legal) causation), and damages to the plaintiff. Individuals owe a duty to all those who may foreseeably be harmed by their actions. Since Jimmy is an adult, as he is over 18, the standard of care of acting as a reasonableadult under the circumstances will be imposed upon him rather than the standard of care of a child of like age, knowledge, education, maturity, and experience (even though Jimmy is a minor for purposes of alcohol possession and consumption). It is obvious from the facts that Jimmy breached the applicable standard of care of acting with reasonable care by driving after becoming intoxicated, because this is not an action that a reasonable adult would take; and, thus, Jimmy will be liable to all those who could foreseeably be harmed by his breach of the standard of care. Vance will be able to use breach of the statutes prohibiting drunk driving as evidence of negligence in this case (in Arkansas, breach of an applicable statute can be used as evidence to help prove negligence but does not conclusively establish negligence). Jimmy's act of driving while intoxicated was an actual cause of the injuries to Vance because such injuries would not have occurred if Jimmy had not been driving the wrong way on the exit ramp, which probably would not have occurred if Jimmy had not been driving while intoxicated. In addition, Jimmy's act of driving while intoxicated was the proximate cause of Vance's injuries because there were no significant intervening acts to interrupt the causal chain of connection between Jimmy's negligent act and the harm to Vance. The damages element of negligence is met because there was personal injury to Vance.

Because all the elements of negligence are met, Vance should probably be able to recover from Jimmy for negligence. Arkansas is a modified comparative fault jurisdiction, meaning that contributory negligence by Vance due to violation of the statute prohibiting the use of bicyclists of the freeway ramp will not automatically render him unable to recover from the defendants in a

tort action. However, Vance must be less than 50 percent at fault for him to obtain any recovery against the defendants in this case. When multiple defendants are involved, the percentage of fault of each of the defendants in the case are added together. And if the sum of the fault percentage of all the defendants in a case is over 50 percent, the plaintiff may recover. However, in a modified comparative fault jurisdiction such as Arkansas, the plaintiff may recover only according to the percentage of fault of the defendants. Thus, Vance may recover as long as any contributory fault of Vance in this matter does not exceed 50 percent as compared to the fault of all the defendants combined in the matter. It is not necessary that Jimmy alone be over 50 percent at fault for Vance to be able to recover from Jimmy.

Vance may be able to recover damages for loss of enjoyment of life, pain and suffering, medical expense (and future medical expenses attributable to the accident, but not those for the cancer), mental anguish (because there is also physical harm, which Arkansas requires in order to recover for mental distress in a negligence action), and lost wages. Future lost wages and future medical expenses payments would need to be reduced to present value. However, there may not be much recovery for future lost wages and future medical expenses attributable to this accident because it appears that Vance may die soon from testicular cancer from these facts. (I am making the assumption that the fact that Vance has end-stage testicular cancer means his life will probably end soon).

B. Potential liability of the Rabbit Hole Tavern.

Vance may also have a cause of action against the Rabbit Hole Tavern for negligence. There is a recent legislative enactment in Arkansas that allows dramshops, such as taverns, to potentially be liable to third parties if they serve alcohol to those under 21 or serve alcohol to those who are apparently already intoxicated. Violation of Arkansas statutes is evidence of negligence rather than conclusive proof of negligence. Therefore, if Vance can prove the elements of negligence (see Part A above) against the Rabbit Hole Tavern, Vance may recover against the Rabbit Hole Tavern for negligence. This statute can probably be used to help establish both a duty to third parties, such as Vance (because duties can be established by statute) and the applicable standard of care. In addition, breach of this statute can be used as evidence of breach of the standard of care. Rabbit Hole Tavern will probably be found to have been an actual cause of the harm to Vance because they did serve the alcohol to underaged Jimmy, without which he would not have been leaving the tavern intoxicated and then driving drunk home. Proximate causation may be a little harder to prove, but distance in time and space is part of the consideration for proximate cause, and in this fact pattern it appears that Jimmy had just left the tavern moments before the accident occurred. This will factor in to support a finding of proximate cause. The tavern may assert that Jimmy's driving away from the tavern was an intervening act, but this defense would likely fail because that type of act (driving intoxicated away from the tavern), was foreseeable. In addition, Vance suffered harm due to personal injury from the accident. Thus, it is likely that Vance will be able to establish the tort of negligence for a cause of action against the tavern.

Arkansas is a modified comparative fault jurisdiction, meaning that contributory negligence by Vance due to violation of the statute prohibiting the use by bicyclists of the freeway ramp will

not automatically render him unable to recover from the defendants in a tort action, although the defendants can and should assert Vance's violation of the statute to prove that Vance was partially at fault in this matter. Plaintiffs must be less than 50 percent at fault for him to obtain any recovery against the defendants in this case. When multiple defendants are involved, the percentage of the fault of each of the defendants in the case are added together, and if the sum of the fault percentages of all of the defendants in a case is over 50 percent, the plaintiff may recover. However, in a modified comparative fault jurisdiction, such as Arkansas, the plaintiff may recover only according to the percentage of fault of the defendants. Thus, as long as any contributory fault of Vance in this matter does not exceed 50 percent as compared to the fault of all defendants combined in this matter, Vance may recover a total percentage of the damages for the percentage for which he is not at fault. It is not necessary that the tavern alone be over 50 percent at fault for Vance to be able to recover against the tavern.

Vance may be able to recover damages for loss of the enjoyment of life, pain and suffering, medical expenses (and future medical expenses attributable to the accident, but not those for cancer), mental anguish (because there is also physical harm, which Arkansas requires in order to recover from mental distress in a negligence action), and lost wages. Future lost wages and future medical expenses payments would need to be reduced to present value. However, there may not be much recovery for future lost wages and future medical expenses attributable to this accident because it appears that Vance may die soon from testicular cancer from these facts. (I am making the assumption that the fact that Vance has end-stage testicular cancer means his life will probably end soon). Vance's testicular cancer will thus make the damages that Vance can recover somewhat more limited than if Vance was completely healthy when he was struck by the car.

C. Potential Liability of Harvey Hare.

As to an action against Harvey Hare, the issue is whether Harvey Hare and Jimmy Seward were involved in a concerted effort or common scheme. If they were not, Vance will not have a cause of action against Harvey Hare because Harvey committed no act that was a proximate or actual cause of Vance's injuries. In addition, there is nothing in the fact pattern to indicate that there is any relationship between Harvey and Jimmy, such as a principal/agent relationship or employer/servant relationship that would allow recovery under a vicarious liability theory.

As to all the above potential defendants, it should be noted that Arkansas has abolished joint and several liability, except in the case of a concerted effort or when an agent or employee is acting on behalf of an employer or principal. Thus, Vance will probably need to recover from each defendant individually rather than being able to recover his total amount of recoverable damages from one defendant who could then seek contribution from any other defendants.

2. Bubba Batalia will not be liable under the statute listed above in Question 1 that allows third parties to recover from dramshop owners who serve alcohol to those under 21. The statute contains an exception to liability for social hosts, but Jimmy may still be held liable for his own negligence (see the discussion under the Question 1 heading). And there is still the possibility of

recovering for any negligence by Harvey Hare if it is found that Harvey Hare and Jimmy Seward were engaging in a concerted effort by drinking underage at the tavern together and both going home drunk in a vehicle driven by Jimmy while Jimmy was intoxicated.

3. Vance will be able to recover against Vroom Motors under the theory of strict liability for sale of a defective product. Arkansas recognizes the tort of strict liability for sale of a defective product when that defect renders the product unreasonably dangerous. Here it appears that there was a defect in the vehicle and that such defect did render the vehicle unreasonably dangerous considering it caused the vehicle to veer out of its lane. Here it appears that Vance is not at fault at all, so Vance will probably be able to recover a full 100 percent amount of his damages against Vroom Motors. In addition, Vance will be able to recover more in damages because he was perfectly healthy at the time of the collision. Thus, he will have more damages to recover due to expectation of a longer life in the form of lost wages, future pain and suffering, future medical expenses and loss of enjoyment of life.

There does not appear to be any negligent action by Jimmy or Harvey in this case that will allow Vance to recover from either in an action for negligence.